

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 58419-7-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
	)	
JAMES WAYNE CARDIN,	)	
	)	
Appellant.	)	FILED: July 20, 2009

Grosse, J. — The State fulfills its obligations under a plea agreement if it acts in good faith and does not contravene the defendant’s reasonable expectations. The plea agreement in this case required the State to recommend a Special Sex Offender Sentencing Alternative (SSOSA) only if it found James Cardin’s sexual deviancy evaluation “acceptable.” Because the prosecutor had a good faith basis to find Cardin’s evaluation unacceptable, we conclude he did not breach the plea agreement by opposing a SSOSA. We further conclude that Cardin’s sentencing was not infected by his original counsel’s deficient performance. We therefore affirm the court’s decision denying a SSOSA and imposing a sentence within the standard range.

### FACTS

Based on allegations that Cardin repeatedly raped his daughter over a period of years, the State charged him by amended information with one count of rape of a child in the first degree, and two counts of rape of a child in the second degree. A jury

convicted him as charged. Prior to sentencing, Cardin hired new counsel and moved for relief from the verdicts based on his first attorney's failure to inform him of the terms of a plea bargain. Specifically, he claimed his counsel was ineffective for failing to inform him that the plea bargain could result in a SSOSA disposition with all but six months of his sentence suspended. The court granted the motion, set aside the verdicts, and ordered specific performance of the plea bargain.

Cardin then pleaded guilty to a third amended information charging two counts of rape of a child—one covering the time period before the victim's 12th birthday, and one covering the period between her 12th and 14th birthdays. The plea agreement stated in part:

Upon receipt of a sexual deviancy treatment evaluation and treatment plan each acceptable to the State from a sexual deviancy therapist acceptable to the State, the State will recommend that the execution of all but 6 months of the sentence of 120 months . . . be SUSPENDED . . . .

Before sentencing, Cardin submitted to a sexual deviancy evaluation conducted by Dr. Michael O'Connell. Despite his guilty plea, Cardin initially denied molesting the victim before she was 12. He said he wrestled with her, rubbed lotion on her back, and spanked her bare bottom. When confronted with the victim's specific allegations, he still denied molesting her before age 12, but said, "I may have touched her, but I don't feel in a sexual way." He conceded that he might have put his finger in her vagina "during the spanking . . . and when I was rubbing the lotion on her."

Dr. O'Connell scheduled a polygraph to clarify when the abuse began, when it stopped, and the extent of the victim's resistance. In a pre-polygraph interview, Cardin

admitted for the first time that he molested the victim when she was younger than 12. He also disclosed for the first time that the abuse continued after the victim moved in with her mother. He admitted that he had failed to tell Dr. O'Connell about peeping at the victim through the bathroom door. When asked about how the victim responded to his advances, Cardin told the polygrapher, "[Y]ou always tell them something to make them cover it up."

The first polygraph examination regarding his sexual history indicated deception. During a post-test interview, Cardin admitted masturbating while watching women from his car. He said this occurred when he was 19 or 20 and continued until he was caught and arrested at age 25.

At the next polygraph examination, Cardin admitted masturbating in his vehicle 10 to 12 additional times when he was 30 to 32 years old. The test results indicated there had been no deception during this test.

Dr. O'Connell also administered a personality test. Cardin's profile was "very rare in samples of normals," and persons presenting with it tend to deny problems, blame others, and terminate treatment prematurely. The test showed that Cardin "utilizes a number of justifications and excuses to keep from accepting full accountability for his sexually assaultive behaviors . . . ." Dr. O'Connell identified this trait as a particular concern, noting that "[t]o the extent that he holds onto these excuses, he is less likely to change."

While concluding that Cardin was a "reasonable candidate for [a] SSOSA," Dr.

O'Connell repeatedly emphasized Cardin's difficulty with being truthful. He noted that even after Cardin received "a second chance at avoiding a lengthy prison sentence with an opportunity of a SSOSA evaluation," it still took "a series of polygraph exams [for him] to come clean about the extent of his abuse of his daughter and his sexual history."

At sentencing, the prosecutor opposed a SSOSA, arguing in part that Cardin was a poor candidate given his "significant difficulty coming clean." The prosecutor further argued that the court could consider any information in the record relating to Cardin's suitability for a SSOSA. Defense counsel countered that because Cardin's trial and associated proceedings would not have occurred but for his counsel's failure to fully communicate the State's plea offer, and because the court ruled that Cardin was entitled to specific performance, the sentencing court could not consider anything in the record that occurred between the time of the original plea offer and the court's reinstatement of that offer.

In denying Cardin's SSOSA request, the court indicated that it only considered Dr. O'Connell's report and Cardin's behavior after the plea offer was reinstated. It concluded that a SSOSA was not appropriate given that it had been "like pulling teeth" to get Cardin to fully disclose and admit his crimes. The court stated:

At the heart of a recommendation for a Special Sexual Offender Sentencing Alternative and what I think, to me, counts for more than who the victims may be or the particular dynamics of the offense history is honesty. It is expected. It is what is required if someone's going to address their own behavioral problems and seek to overcome them.

...

I still am seeing and troubled by the fact that there is continuous

minimization and equivocation about what's happened here, and that just makes me more than uneasy in granting the particular exception to the sentencing provision. And so I impose [a standard range sentence].

Cardin appeals.

## ANALYSIS

Initially, the parties dispute whether Cardin can challenge his standard range sentence. The State invokes the rule that a standard range sentence is generally not appealable.<sup>1</sup> There are exceptions to this rule, however, for challenges to the court's sentencing procedures and violations of due process.<sup>2</sup> A prosecutor's breach of a plea agreement at sentencing violates due process<sup>3</sup> and, in certain circumstances, proper sentencing procedures.<sup>4</sup> The sentencing court's alleged failure to enforce and abide by the prior award of specific performance also implicates due process. Thus, the issues in this appeal are properly before us.

Turning to the merits, Cardin first contends the prosecutor breached the plea agreement when he opposed a SSOSA. He acknowledges that the agreement obligated the State to recommend a SSOSA only if the sexual deviancy evaluation, treatment plan, and evaluator were "acceptable to the State." He argues, however, that

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<sup>1</sup> State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); RCW 9.94A.585.

<sup>2</sup> State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004) (standard range sentence may be appealed where constitutional violation is alleged); State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004) (standard range sentence may be challenged on constitutional or procedural grounds).

<sup>3</sup> State v. McNally, 125 Wn. App. 854, 861-62, 106 P.3d 794 (2005).

<sup>4</sup> State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002).

the prosecutor had no good faith basis to find the evaluation unacceptable. We disagree.

A plea agreement is a contract,<sup>5</sup> and a prosecutor must act in good faith when carrying out its terms.<sup>6</sup> Cardin claims the prosecutor in this case did not act in good faith because “[t]he only items in the evaluation the [S]tate found ‘unacceptable’ were items the [S]tate either knew at the time it tendered the offer or which arose from [Cardin’s first attorney’s] deficient performance.” This claim is contrary to the record.

The State gave the court seven reasons for opposing a SSOSA: (1) Cardin’s difficulty coming clean; (2) information in Dr. O’Connell’s evaluation indicating that Cardin continued to masturbate in his car while looking at strangers even after being arrested for the same behavior; (3) information in the O’Connell evaluation indicating that Cardin had also abused his sister for years; (4) his admissions in the O’Connell evaluation that he used greater force during the incidents than had previously been disclosed; (5) his lack of remorse; (6) the fact that O’Connell’s endorsement of a SSOSA was not enthusiastic; and (7) the fact that Cardin’s defense at trial went beyond denial and actually accused his daughter, sister, and ex-wife of fabricating allegations for their own purposes. The majority of these reasons were based wholly or partially on information that emerged following the court’s award of specific

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<sup>5</sup> State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003).

<sup>6</sup> State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997); State v. Marler, 32 Wn. App. 503, 508, 648 P.2d 903, rev. denied, 98 Wn.2d 1007 (1982); McInally, 125 Wn. App. at 861-62 (State fulfills its obligations under a plea agreement if it acts in good faith and does not contravene the defendant’s reasonable expectations arising from the agreement).

performance and Cardin's guilty plea. Significantly, the prosecutor's "[f]irst and foremost" reason for opposing a SSOSA—i.e., Cardin's difficulty coming clean—was based almost entirely on Cardin's conduct during Dr. O'Connell's post-plea evaluation.

Because the prosecutor's reasons for rejecting the evaluation were valid and based largely on information that emerged after the plea offer was reinstated, we conclude he acted in good faith and did not breach the plea agreement by opposing a SSOSA.

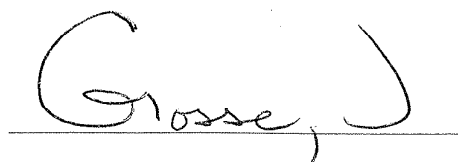
Contrary to Cardin's assertions, the trial court did not find that the prosecutor acted in bad faith. The court speculated that, "but for all that occurred and the ineffective assistance of counsel," the State "likely" would not have "picked apart" the evaluation and would have supported a SSOSA. But it then emphasized the State's broad discretion under the plea agreement to "look at the substance of the evaluation" and reject evaluations that were not "acceptable." Thus, not only was there no finding of bad faith, but the court's ruling indicates that the prosecutor acted within the broad discretion afforded him by the plea agreement.

Cardin next contends the trial court failed to ensure that his sentencing was not infected by his original counsel's deficient performance. Because the remedy for counsel's omission was specific performance of the plea offer, Cardin contends he was entitled to be restored to the position he was in at the time of the original offer. According to Cardin, this meant that the sentencing court and the prosecutor could not rely on "facts that would not have come to light but for counsel's deficient performance."

The sentencing court erred, he concludes, in allowing the prosecutor to argue such facts and in relying on them in its decision. The State, on the other hand, contends specific performance only entitled Cardin to reinstatement of the original plea offer and did not require the court and the prosecutor to ignore facts that came to light following counsel's deficient performance.

We need not resolve this dispute because even assuming the court was required to ignore any evidence resulting from defense counsel's deficient performance, the court met that requirement. When this dispute arose at sentencing, the court allowed counsel to make their respective arguments and gave defense counsel a standing objection to the disputed evidence. Ultimately, the court sided with the defense, stating that it had only considered facts arising prior to counsel's deficient performance and after the award of specific performance. The court expressly disregarded "the fact that there was a trial or the youngsters had to testify or things of that sort." Instead, the court focused on Cardin's behavior "once he . . . got back to the position that he was in when the State's offer was made initially . . . ." The court thus ensured that Cardin was not prejudiced by his counsel's deficient performance.<sup>7</sup>

Affirmed.

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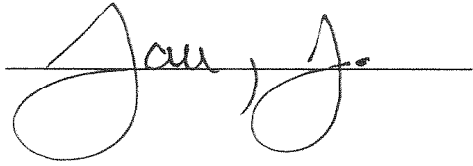
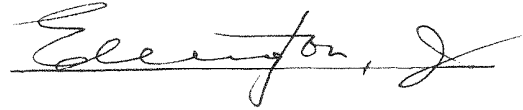
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<sup>7</sup> Cardin's suggestion that the sentencing court was unable to ignore any tainted evidence is contrary to both the record and the well-settled presumption that a judge in a bench trial will not consider inadmissible evidence. State v. Read, 147 Wn.2d 238, 244-46, 53 P.3d 26 (2002).



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WE CONCUR:

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